STATE OF MICHIGAN

COURT OF APPEALS

SKYWORKS, INC.,

Plaintiff-Appellee,

v

SHELBY TOWNSHIP,

Defendant,

and

CITY OF FRASER,

Defendant-Appellant.

UNPUBLISHED
April 28, 2009

No. 279671
Macomb Circuit Court
LC No. 2006-001969-NO

SKYWORKS, INC.,

Plaintiff-Appellee,

v

SHELBY TOWNSHIP,

Defendant-Appellant,

and

CITY OF FRASER,

Defendant.

No. 279865
Macomb Circuit Court
LC No. 2006-001969-NO

Before: Servitto, P.J., and Owens and K. F. Kelly, JJ.

K. F. KELLY, J. *(Dissenting).*

I respectfully dissent. Contrary to the majority, I would hold that the trial court erred when it injected it's own policy preferences into the issue at hand, disregarded the defendant municipalities' constitutional role in our system of government and impermissibly encroached

upon the authority and powers of the local municipalities; it erred in finding the complained of ordinances banning the sale of fireworks in temporary, outdoor establishments unconstitutional; and, it further erred by ordering defendants to provide plaintiff with the necessary permits to operate temporary facilities for the sale of legal fireworks in Michigan and then by conditioning the permits on the plaintiff providing fire suppression systems in their temporary structures. I would reverse.

We review de novo a trial court's decision regarding the constitutionality of an ordinance. *Plymouth Twp v Hancock*, 236 Mich App 197, 199; 600 NW2d 380 (1999). At issue here is whether the requirement that retail sales of fireworks must be confined to permanent structures equipped with fire suppression systems is unconstitutional as a violation of plaintiff's due process rights and rights of equal protection. I would hold that it is not. As a matter of law, just because a statute or ordinance requires different treatment of different classes of people does not mean it is unconstitutional. As our Supreme Court stated in *Phillips v Mirac, Inc*., 470 Mich 415, 431-432; 685 NW2d 174 (2004):

> As is apparent, when any statute is passed, the Legislature is almost invariably deciding to treat certain individuals differently from others. This exercise of discrimination between citizens means, for example, that some pay taxes at one rate, while others pay at another rate. Or some get a tax or social service benefit that others do not, and so on. Line drawing of this sort is inherent in all governments and in ours it is done at the state level by the Legislature, Const 1963, art 4, § 1, and locally by local legislative bodies. The Constitution of Michigan was, in fact, written in large part to institutionalize this method of decision-making. Thus, it is apparent that when the Legislature acts, it cannot be that the mere occurrence of different outcomes between two citizens is in itself sufficient to make an act unconstitutional. Otherwise, what the Constitution gives with one hand--the right to representative government--it would have taken away with the other--the equal protection guarantee. Accordingly, courts here and elsewhere in the United States have been very guarded about overruling the legislatures' decisions by declaring unconstitutional the classifications that a legislature defined. Indeed, the undesirability of courts entering into this area prompted United States Supreme Court Justice Oliver Wendell Holmes to deride all arguments of this sort as "the usual last resort of constitutional arguments." *Buck v Bell*, 274 U.S. 200, 208; 47 S. Ct. 584; 71 L. Ed. 1000 (1927).

As noted by the majority, in *Landon Holdings, Inc v Grattan Twp*, 257 Mich App 154, 173-174; 667 NW2d 93 (2003), this Court addressed the test to be used for evaluating equal protection and substantive due process claims for the type of ordinance at issue here:

> The state and federal constitutions guarantee equal protection of the laws. US Const, Am XIV; Const 1963, art 1, § 2; *In re Hawley*, 238 Mich App 509, 511; 606 NW2d 50 (1999). When no suspect or somewhat suspect classification can be shown, the plaintiff has the burden of establishing that the statute is arbitrary and not rationally related to a legitimate governmental interest. *Crego v Coleman*, 463 Mich 248, 259; 615 NW2d 218 (2000). This test specifically applies to zoning ordinances. *Cryderman v Birmingham*, 171 Mich App 15, 26; 429 NW2d 625 (1988).

> The state and federal constitutions also guarantee that no person will be deprived of life, liberty, or property without due process of law. US Const, Am XIV; Const 1963, art 1, § 17; *Marlin v Detroit (After Remand)*, 205 Mich App 335, 339; 517 NW2d 305 (1994). Unless a fundamental right is involved, the statute need only be rationally related to a legitimate governmental interest. *Electronic Data Sys Corp v Flint Twp*, 253 Mich App 538, 549; 656 NW2d 215 (2002). The essence of a claim of violation of substantive due process is that the government may not deprive a person of liberty or property by an *arbitrary* exercise of power. *Id.*
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> The Supreme Court has specifically said that zoning ordinances must be reasonable to comply with due process. *Silva v Ada Twp*, 416 Mich 153, 157-158; 330 NW2d 663 (1982). A zoning ordinance may be unreasonable either because it does not advance a reasonable governmental interest or because it does so unreasonably. *Hecht v Niles Twp*, 173 Mich App 453, 461; 434 NW2d 156 (1988); see also *Cryderman*, *supra.* [Emphasis in original.]

Thus, under the rational basis test, "courts will uphold legislation as long as that legislation is rationally related to a legitimate government purpose." *Phillips*, *supra* at 433, citing *Crego*, *supra* at 259. "This highly deferential standard of review requires a challenger to show that the legislation is arbitrary and *wholly unrelated in a rational way* to the objective of the statute." *Phillips*, *supra* at 433 (emphasis added; internal quotations and citations omitted). This test does not test "the wisdom, need, or appropriateness of the legislation . . . ." *Crego*, *supra* at 260. Rather, the ordinance will be constitutional if the municipality's judgment is supported by any set of facts, either known or which could reasonably be assumed, *even if those facts are debatable*. *Muskegon Area Rental Ass'n v City of Muskegon*, 465 Mich 456, 464; 636 NW2d 751 (2001) (emphasis added). The challenging party must show that the ordinance is based solely on reasons *unrelated* to the pursuit of the municipality's legitimate goals. *Id.*

There is no dispute that the regulation of fireworks in order to prevent fires and protect the public's safety is a legitimate governmental purpose. *Detroit v Qualls*, 434 Mich 340, 365; 454 NW2d 374 (1990). The question here is whether defendants' ordinances are rationally related to this purpose.

Defendants' reasons for adopting the challenged ordinances were, among others, prevention of theft, the requirement of fire suppression systems, structural integrity and external forces. In support of their position, defendants offered the testimony of Shelby Township's fire marshal, Thomas Means. Means was qualified as an expert in fires, arson/fire investigation and fire suppression. He testified that where a fire suppression system has been activated, the smoke level is low and the fire controlled. Thus, the firefighters were able to walk into the building and pick up the smoldering materials. Means explained that the air circulation systems in permanent structures also help dissipate the smoke. Means stated that smoke could not disperse in a tent with walls. Cross-ventilation was the only method for smoke dispersion in a tent with walls. He further testified that he could not find any system that could be used in a tent, but had seen the blueprints for a tent fire suppression system that plaintiff had submitted. His concern with a tent system was whether a sufficient amount of water could be delivered through it and whether the tent could retain enough heat to automatically activate the system. Also, in his opinion, permanent structures were far less likely to collapse. Means stated that there was a concern that

the tent lighting could act as an ignition source, even if it was up to code, if the tent collapsed for any reason. Finally, Means stated that there were external forces that posed a fire safety risk to temporary structures that were not a concern with permanent structures, such as leaking cars, stored liquid fuel for tent generators, parking lot debris, smoking materials, and utility lines and poles. The concern was focused on the potential for these external materials to ignite and set fire to the tent, which in turn would ignite the fireworks. He stated that tents are only flame retardant; they could still burn. In Means's opinion, permanent structures were absolutely a safer environment for firework sales than temporary structures.

Plaintiff presented the testimony of John Steinberg, who was qualified as an expert in fireworks safety and a participant in the drafting of the National Fire Prevention Association's safety code regulations. Steinberg admitted that while he believed a ban on the sales of fireworks in tents was unreasonable, he "absolutely" believed reasonable minds could differ. Furthermore, contrary to the trial court's finding that Steinberg's testimony established that banning sales from temporary structures did not have any safety benefits, Steinberg specifically testified that an enclosed building would contain a fire better than a tent and that there was a split of opinion on whether the sale of fireworks should be confined to permanent structures or permitted to be sold from tents.

In my opinion, the testimony of fire marshal Means was sufficient to show a "rational relationship" to a legitimate governmental interest, particularly in light of Steinberg's concurrence in several of defendants' proffered rationales and total inability to respond to others.[1] Fire prevention and fire suppression are legitimate governmental objectives and the ordinances were rationally related to those objectives, among others. Thus, the ordinances should have been upheld because they are not arbitrary or wholly unrelated to appropriate governmental objectives. The trial court erred in weighing the relative merits of the differing methods of addressing fire safety instead of applying the rational basis test to the challenged ordinances.

Finally, I would note that the trial court implicitly acknowledged that plaintiff's temporary structures were not as safe as enclosed buildings with fire suppression systems when it required defendants' to issue permits "conditioned" on the inclusion of fire suppression systems. This "condition" simply substitutes the trial court's opinion on what the ordinance should say rather than deferring to the municipalities' role in enacting ordinances governing the safety and welfare of their citizens. If the challenged ordinances were truly "unconstitutional" without a rational relationship to a legitimate governmental purpose, there would be no reason to add additional mandates to the issuance of permits. By adding this extra condition, the trial court obviously realized that there was a reasonable relationship between fire safety and the requirement that fireworks be sold in permanent structures equipped with fire suppression systems. As previously noted, ordinances are constitutional if the municipality's judgment is

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[1] By way of example, while Steinberg did not believe that it was easier to steal from a tent than an enclosed building with anti-theft devices, he was not qualified as a loss prevention control expert and plaintiff never offered such an expert to the trial court. As such, defendants' "theft" rationale was unrebutted.

supported by any set of facts, either known or which could reasonably be assumed, *even if those facts are debatable*. *Muskegon Area Rental Ass'n*, *supra* at 464. As Steinberg candidly noted in his testimony, there is a split of opinion as to whether fireworks should be sold in temporary structures; clearly, the issue, at a minimum, was "debatable." Plaintiff failed to show that the ordinances were based solely on reasons *unrelated* to the pursuit of the municipalities' legitimate goals. *Id.*

I would reverse.

/s/ Kirsten Frank Kelly